INDEX

CITATIONS

738799—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1138

JACK HENSLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 64–65) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered February 10, 1947 (R. 66), and a petition for rehearing (R. 67–69) was denied February 19, 1947 (R. 69). The petition for a writ of certiorari was filed March 18, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

A three-count indictment charged petitioner with certain narcotics violations. After he pleaded guilty to count 3 and was sentenced thereon, the United States Attorney *nolle prossed* counts 1 and 2, which charged distinct offenses. The question presented is whether reindictment and prosecution for the offenses charged in counts 1 and 2 constitutes double jeopardy.

STATUTE INVOLVED

The Marihuana Tax Act of 1937, as re-enacted in the Internal Revenue Code, provides in pertinent part:

> § 2591. Order forms.
>
> (a) General requirement. It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred on a form to be issued in blank for that purpose by the Secretary.
>
> * * * * *
>
> § 2593. Unlawful possession.
>
> (a) Persons in general. It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable no-

tice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by the section 2590 (a).

STATEMENT

On December 21, 1942, an indictment in three counts was returned in the District Court for the District of Columbia, charging petitioner with violations of the Marihuana Tax Act of 1937 (R. 3–4, 9). Count 1 charged that petitioner unlawfully sold 48 ounces of marihuana to Benjamin Groff on October 30, 1942, without a written order from Groff on a form issued in blank for that purpose by the Secretary of Treasury (R. 3). Count 2 charged a similar violation in respect of a sale of 940 cigarets and 48 ounces of marihuana to Groff on November 4, 1942 (R. 3–4). See § 2591 (a), I. R. C., *supra*. Count 3 charged that on November 4, 1942, petitioner unlawfully had in his possession 125 grains of marihuana and then and there failed to produce the order form required by law to be retained by him (R. 4). See § 2593 (a), I. R. C., *supra*. Petitioner, who was represented by counsel, pleaded guilty to count 3 (R. 5–6, 9), and he was sentenced, on June 4, 1943, to imprisonment for a period of from one to three years (R. 5, 6, 9). Thereupon the United States Attorney *nolle prossed* counts 1 and 2 of the indictment (R. 5).

On June 4, 1943, petitioner was delivered to the institution which had been designated for his confinement (R. 6). Thereafter, on July 1, 1943, on the district court's own motion, the judgment of June 4, 1943, was vacated (R. 8, 9) and, on oral motion of the United States Attorney, count 3 of the December 1942 indictment was dismissed (R. 8, 9).

On July 10, 1943, a second indictment in eight counts was returned against petitioner charging violations of the Marihuana Tax Act of 1937 (R. 9–13). Counts 1 and 5 of this indictment charged, respectively, the same unlawful sales of marihuana to Groff as had been charged in counts 1 and 2 of the earlier indictment (R. 10, 12; cf. R. 3–4). The remaining counts were eliminated on demurrer, on motion for acquital, or on the Government's motion to dismiss (R. 17, 27, 60–61). After a jury trial, petitioner was found guilty on counts 1 and 5 (R. 27, 33), and he was sentenced on July 12, 1946, to imprisonment for a period of from one to three years (R. 32, 33). On appeal to the United States Court of Appeals for the District of Columbia, the conviction was affirmed (R. 66).

ARGUMENT

Petitioner contends that "Since jeopardy attached when his sentence was imposed and his service began [on the December 1942 indictment], his subsequent conviction for the transactions cov-

ered by those counts of the first indictment, which were *nolle prossed* by the prosecutor, which action was inextricably associated with his plea of guilty, constituted double jeopardy under the Fifth Amendment of the Constitution" (Pet. 5).[1]

Preliminarily, it should be noted that except for the asserted relevance and effect of the "in-

[1] Petitioner also urges that his 27 days of service under the commitment on his plea of guilty to count 3 of the 1942 indictment "divested the trial court of its jurisdiction, over [his] objection, to arbitrarily vacate the judgment" (Pet. 5). That contention, even if it were sound, has no bearing on the jurisdiction of the district court to try him on the 1943 indictment. Its sole relevance is to the question of double jeopardy which is discussed in the text. *United States* v. *Benz*, 282 U. S. 304, 307; *Oxman* v. *United States*, 148 F. 2d 750, 753 (C. C. A. 8), certiorari denied, 325 U. S. 887. However, the district court clearly had authority on July 1, 1943, to vacate the sentence on count 3 of the 1942 indictment, notwithstanding the fact that petitioner had commenced service thereof, since its order was made within term (see R. 9). *United States* v. *Benz* and *Oxman* v. *United States*, *supra; Basset* v. *United States*, 9 Wall. 38, 41; *Frankel* v. *United States*, 131 F. 2d 756, 758 (C. C. A. 6). Even after term, such an order would have been proper if the judgment was void for failure of the indictment to charge an offense. *Mossew* v. *United States*, 266 Fed. 18 (C. C. A. 2); cf. *Bowen* v. *United States*, 134 F. 2d 845, 846 (C. C. A. 5), certiorari denied, 319 U. S. 764. While the record is silent as to the reason for this action of the district court, we have been advised by the United States Attorney that the court concluded that count 3 did not charge an offense. That conclusion seems sound, for count 3 charged unlawful possession of marihuana without retaining the order form required by law, whereas the gist of the offense under Section 2593 (a) of the Internal Revenue Code, under which count 3 was apparently drawn, is the acquisition of marihuana without payment of the required transfer tax.

extricable association" between the plea of guilty to count 3 and the *nolle prosequi* as to counts 1 and 2 of the 1942 indictment, no question of double jeopardy could possibly be involved. Counts 1 and 2 not only related to different transactions than count 3, but they were founded on a criminal prohibition set forth in a different section of the Marihuana Tax Act. Consequently, separate indictment and sentences for the offenses charged in those counts would not be constitutionally inhibited. *Blockburger* v. *United States,* 284 U. S. 299, 301–302, 304. Moreover, since it does not appear that petitioner was ever put to trial on counts 1 and 2 of the 1942 indictment or that a jury had been sworn or evidence taken (see R. 5, 9), the situation falls within the settled rule that reindictment and trial on criminal charges which were previously *nolle prossed* before jeopardy had attached does not constitute second jeopardy under the Fifth Amendment. See e. g., *United States* v. *Fox,* 130 F. 2d 56, 58 (C. C. A. 3), certiorari denied, 317 U. S. 666; *District of Columbia* v. *Buckley,* 128 F. 2d 17, 20 (App. D. C.), certiorari denied, 317 U. S. 658; *McCarthy* v. *Zerbst,* 85 F. 2d 640, 642 (C. C. A. 10), certiorari denied, 299 U. S. 610; *Buie* v. *United States,* 76 F. 2d 848, 849 (C. C. A. 5), certiorari denied, 296 U. S. 585.

The only question here, therefore, is whether the otherwise constitutional propriety of peti-

tioner's reindictment and conviction is affected by reason of the asserted "inextricable association" of the *nolle prosequi* and his guilty plea. Articulation of why that association should render the general rule inapplicable is lacking. Petitioner's contention may be bottomed on the theory that jeopardy attached on all counts of the 1942 indictment when, on his plea of guilty to count 3, he was convicted and sentenced and counts 1 and 2 were *nolle prossed* (see Pet. 7). However, as we have noted, petitioner had not been put to trial on counts 1 and 2 so that under established conceptions jeopardy had not attached on those counts prior to their dismissal. See, e. g., *Bassing* v. *Cady,* 208 U. S. 386, 391–392; *McCarthy* v. *Zerbst, supra; Sanford* v. *Robbins,* 115 F. 2d 435 (C. C. A. 5), certiorari denied, 312 U. S. 697. The mere fact that these counts were not dismissed until after petitioner's plea and conviction on count 3 did not change the picture. The plea and conviction were in terms confined to count 3 (see R. 5–6). Consequently, they could not affect the status of counts 1 and 2, for the law is that "Each count in an indictment is regarded as if it was a separate indictment." *Dunn* v. *United States,* 284 U. S. 390, 393.

For the same reasons, reindictment and prosecution for the offenses described in counts 1 and 2 of the 1942 indictment was not constitutionally barred even if it be assumed that petitioner's

plea to count 3 was induced by a promise or understanding that he would not be prosecuted for those offenses. Such a circumstance would not alter the fact, upon which application of the constitutional proscription turns, that jeopardy had not attached in the proceedings on the 1942 indictment with respect to counts 1 and 2. In any event, no such promise or understanding is shown by the record. And even if it were, it would not be binding nor estop the Government from proceeding anew on those charges. *District of Columbia* v. *Buckley, supra; Buie* v. *United States*, supra.

CONCLUSION

The judgment below is clearly correct and the petition for a writ of certiorari is without merit. We respectfully submit, therefore, that the petition should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

APRIL 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947